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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

MICHAEL G. ALLFORD,

Plaintiff and Appellant,

v.

ROBERT BARTON et al.,

Defendants and Respondents.

F074780

(Super. Ct. No. BCV-15-101554)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Law Office of William A. Romaine and William A. Romaine for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Chris A. Knudsen, Assistant Attorney General, Elisabeth Frater, Venessa F. Martinez and Jaclyn V. Younger, Deputy Attorneys General, for Defendants and Respondents.

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Plaintiff Michael G. Allford sued his former employer and four supervisory employees alleging violations of the California Fair Employment and Housing Act

(FEHA; Gov. Code, § 12900 et seq.).<sup>1</sup> He alleged, among other things, that his employment was terminated on May 7, 2013, in retaliation for filing a lawsuit against his employer and supervisors in March 2013. That March 2013 lawsuit alleged discrimination based on a perceived disability and disclosures of confidential information and was dismissed voluntarily in August 2013. In the present action, which was filed in November 2015, the trial court sustained a demurrer without leave to amend, concluding Allford's first cause of action failed to state a claim and the other four causes of action were untimely. Allford appealed.

As to the first cause of action, we agree with the trial court's interpretation of the complaint and statutory provisions. We conclude the alleged acts of disability discrimination in the employment context do not constitute a denial of rights created by Civil Code section 51, subdivision (f) and, therefore, do not state a cause of action under section 12948.

Allford's second through fifth causes of action include allegations of (1) retaliation in response to his exercising rights protected by FEHA, and (2) a failure to prevent discrimination. (§ 12940, subds. (h), (k).) The trial court concluded these causes of action were untimely under the one-year statute of limitations set forth in section 12965. We conclude those claims are not necessarily time barred because the limitations period might have been equitably tolled while Allford pursued his claims in federal court. (*Addison v. State of California* (1978) 21 Cal.3d 313, 319 (*Addison*) [statute of limitations equitably tolled during pendency of a federal lawsuit].) Accordingly, Allford will be given leave to amend to allege facts in support of his equitable tolling theory. Also, the federal court's order dismissing Allford's federal claims and declining to exercise pendent jurisdiction over his remaining state law claims

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<sup>1</sup> All unlabeled statutory references are to the Government Code.

was not a final judgment on the merits of his state law claims. Therefore, res judicata does not preclude Allford from pursuing the second through fifth causes of action.

We therefore reverse the judgment of dismissal and remand for further proceedings.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Allford was employed as a Special Assistant Inspector General by California's Office of the Inspector General (OIG). During his employment, his principal work station was located in Bakersfield. During the times relevant to this lawsuit, defendant Robert Barton occupied the position of (1) Senior Assistant Inspector General, Central Region, (2) Acting Inspector General, or (3) Inspector General. Defendant Roy Wesley occupied the position of Chief Deputy Inspector General or Acting Chief Deputy Inspector General. Defendant James Spurling occupied the position of General Counsel in the OIG. Defendant Mae Gordon, Allford's immediate supervisor, occupied the position of Senior Assistant Inspector General, Central Region. For purposes of this opinion, "defendants" refers to OIG and the four individual defendants.

While employed by OIG, Allford developed a serious physical or mental condition that resulted in his being temporarily disabled. As a result of this condition, Allford was authorized to be absent from his service as a special assistant based on a medical excuse. Subsequently, Allford's disability ameliorated or abated and he was able to perform his job, including qualifying as a "peace officer" and carrying a firearm in the course of his employment. In 2009, following his recovery, Allford resumed full duties as a special assistant. Barton issued an official memorandum dated March 24, 2009, advising Allford's supervisors that Allford had been cleared for a full return to duty.

Allford alleges Barton inappropriately circulated confidential details about his condition to his employment supervisors and peers who had no legitimate reason for being advised of them, and Barton continued to disclose confidential information despite Allford's repeated demands for confidentiality. Allford alleges the disclosure of the

confidential details about his condition was likely to result in the erroneous perception among OIG personnel that he could not perform his employment because of a perceived physical or mental disability.

On March 2, 2012, Allford delivered a letter to Wesley stating that, in response to Wesley's order, Allford was providing a memo of his legitimate concerns as to the use of his confidential medical information and "the recent unauthorized release of medical information by HR staff." The letter stated Allford was fully prepared to litigate the issue to protect his rights as an employee. Following the receipt of his letter, Allford alleges defendants engaged in a campaign of retribution against him that included: (1) repeated, unnecessary admonitions; (2) falsely downgraded performance reviews; (3) arbitrary denials of his requests for privileges routinely provided to similarly situated employees; (4) "write ups" for incidents when written admonitions were not necessary; and (5) a deliberate use of the progressive disciplinary system to create the false appearance that Allford was continuing on a course of misconduct and insubordination. Allford alleges defendants' conduct was substantially motivated by a desire to retaliate against him for asserting rights under FEHA and the Americans with Disabilities Act of 1990 (ADA; 42 U.S.C. §§ 12101–12213).

In March 2012, Allford filed a formal complaint with the Equal Employment Opportunity Commission (EEOC) relating to the dissemination of confidential medical information and a suspension based on circumstances that ordinarily would have resulted in only a reprimand of a person not perceived to be disabled. After this complaint was filed with the EEOC, Allford alleges the individual defendants increased the adverse actions towards him. For instance, Wesley and Gordon subjected his time records to increase scrutiny and exaggerated the importance of minor discrepancies.

The record contains a copy of a completed form for an administrative complaint of discrimination under FEHA dated March 15, 2012. In the complaint, Allford alleges OIG and Barton released and discussed his private medical and disciplinary records with

coworkers and supervisors for no business reason and without his permission or authorization. A March 22, 2012, letter from California's Department of Fair Employment and Housing (DFEH) to Allford stated the matter had been closed based on "An Administrative Decision" and notified him of his right to sue "within one year from the date of this letter."

After March 2012, Allford continued to assert his rights. His pleading describes these actions and additional retaliatory conduct by defendants, which need not be set forth in detail here.

In April 2013, Allford was placed on administrative leave pending an investigation of allegations of misconduct. In later April 2013, Allford was served with a notice of adverse action stating that his employment was terminated effective May 7, 2013. Allford contends the OIG's investigation and termination of his employment was in retaliation for his filing of the following lawsuit.

**First State Court Lawsuit**

On March 8, 2013, about two months before he was discharged, Allford filed a complaint for damages against defendants in Kern County Superior Court. Allford, a licensed attorney, represented himself in that case. The complaint listed causes of action for violations of FEHA, intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, libel, slander, negligence and retaliation. The underlying allegations asserted (1) the inappropriate disclosure of confidential medical information, and (2) harassment, discrimination and retaliation against Allford for complaining about the disclosures.

In addition, the complaint referred to two right-to-sue notices from DFEH. The first was the March 22, 2012, letter described above. The second was dated October 24, 2012.

On August 12, 2013, Allford requested the lawsuit be dismissed without prejudice by the Kern County Superior Court. On October 2, 2013, a notice of entry of the dismissal was filed.

**Federal Lawsuit**

In January 2014, Allford's attorney filed a complaint for damages against defendants in the United States District Court for the Eastern District of California. The complaint also requested an injunction directing defendants to reinstate Allford retroactive to May 7, 2013, without loss of benefits or seniority.

On April 2, 2014, DFEH issued a right-to-sue notice relating to a case assigned EEOC No. 480-2014-00847C. The administrative complaint addressed by this notice is not part of the appellate record and Allford's first amended complaint includes no allegations as to its contents. However, papers Allford filed in the trial court described the contents of the administrative complaint. He stated the "charge alleged that the termination of Allford's employment on May 7, 2013 was in retaliation for his filing the 2013 Complaint in [Kern County Superior C]ourt alleging violation of rights secured by Allford under the ADA and the FEHA." His papers also described it as "a new charge of discrimination alleging retaliatory termination." This assertion about his termination being the basis for a new charge is consistent with the appellate record, which contains no other DFEH's right-to-sue notice issued *after* the termination of Allford's employment.<sup>2</sup> The DFEH's April 2, 2014 right-to-sue notice is significant in this appeal because it is treated as the event that commenced the running of the statute of limitations under section 12965.

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<sup>2</sup> Based on the allegations in the complaint, documents subject to judicial notice, the assertions Allford made in his trial court papers, and the representations made during oral arguments as to the additional facts that could be alleged, we conclude Allford has carried his burden of demonstrating a "reasonable possibility" of amending his complaint to allege the April 2, 2014 right-to-sue notice is the first right-to-sue notice that addressed his claim relating to the termination of his employment.

In September 2014, Allford filed a first amended complaint in the federal action. The first cause of action alleged the individual defendants, acting under color of state law, deprived Allford of rights secured by the United States Constitution or federal statute. The second cause of action alleged employment discrimination in violation of the ADA. The third through fifth causes of action alleged violations of FEHA based on employment discrimination, retaliation and harassment. The sixth cause of action alleged a conspiracy to deprive Allford of rights secured by the California Unruh Civil Rights Act (Civ. Code, § 51) in violation of section 12948.

Among other things, the first amended complaint alleged the termination of Allford's employment was the direct result of retaliation against Allford for asserting his rights, including his initiation of litigation in Kern County Superior Court against defendants. It also alleged in general terms (i.e., without mentioning the DFEH's April 2, 2014 right-to-sue notice) that Allford had received the right-to-sue notices that were a prerequisite to filing litigation.

Defendants responded to the first amended complaint by filing motions to dismiss. In May 2015, the federal court filed an order addressing those motions. The court dismissed the second (ADA) and sixth (§ 12948) causes of action with prejudice and granted leave to amend the other claims.

In June 2015, in accordance with the leave granted by the federal court, Allford filed a second amended complaint. The first cause of action again alleged the individual defendants, acting under color of state law, deprived Allford of rights secured by the United States Constitution or federal statute. The second through fourth causes of action alleged violations of FEHA based on employment discrimination, retaliation and harassment. Again, defendants responded by filing motions to dismiss.

On October 23, 2015, the federal court filed an order regarding defendants' motions to dismiss the second amended complaint. The court dismissed the first cause of action with prejudice, concluding it failed "to state a claim upon which relief can be

granted pursuant to 42 U.S.C. § 1983.” The court granted OIG’s motion to dismiss the second, third and fourth causes of action for lack of subject matter jurisdiction, and then declined to exercise pendent jurisdiction of the remaining state law claims because all of the federal claims had been dismissed.

### **Current Lawsuit**

On Monday, November 23, 2015, (31 days after the dismissal of his federal action) Allford filed the present action in Kern County Superior Court. In January 2016, Allford filed a first amended complaint for injunctive relief and damages (FAC), which is the operative pleading in this appeal.

In May 2016, defendants filed a demurrer that raised a number of grounds, including the statute of limitations. Defendants supported their demurrer with a request for judicial notice of (1) documents filed in Allford’s first case in Kern County Superior Court, (2) documents filed in his federal lawsuit, (3) records relating to his administrative claims with EEOC and DFEH, and (4) a May 16, 2013, decision by the State Personnel Board relating to Allford’s appeal of a five-day suspension.

Allford’s opposition to the demurrer asserted (1) collateral estoppel did not apply to his state law claims, (2) defendants’ reliance on a failure to exhaust administrative remedies was misplaced, and (3) the statute of limitations did not expire until December 8, 2015—a date after his November 23, 2015, filing of this action. Allford argued the April 2, 2014 right-to-sue notice from the DFEH stated EEOC would be investigating the matter under a work sharing arrangement between EEOC and DFEH, and the one-year statute of limitations would be tolled until EEOC concluded its investigation and issued its own right-to-sue notice. Allford stated the tolling of the statute of limitations ended when EEOC issued its right-to-sue letter on December 8, 2014, and his filing of this lawsuit on November 23, 2015, was within one year of that date. Allford asserted “the DFEH is adhering to the broadly accepted reasoning in *Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, 1099–1100 that equitable tolling of the DFEH statute

of limitation avoids wasteful litigation, where the DFEH assigns its investigative authority to the EEOC under a work sharing arrangement.”

In August 2016, after a hearing, the court filed a minute order addressing the demurrer and granting defendants’ request for judicial notice of: (1) Allford’s first amended complaint filed in federal court on September 4, 2014; (2) the federal court order filed May 22, 2015, which dismissed Allford’s section 12948 claim with prejudice; (3) the DFEH right-to-sue letter dated April 2, 2014; and (4) the EEOC right-to-sue letter dated December 8, 2014.<sup>3</sup> The court also took judicial notice of the fact that the present lawsuit was filed on November 23, 2015. The court sustained the demurrer to the first cause of action without leave to amend on the grounds that section 12948 and Civil Code section 51 are inapplicable to employment discrimination cases and the federal court’s May 22, 2015 dismissal order collaterally estopped the first cause of action. The court also sustained the demurrer to the second through fifth causes of action without leave to amend based on the statute of limitations contained in section 12965.

A judgment in favor of defendants was filed to implement the trial court’s order sustaining the demurrer. This timely appeal followed.

## **DISCUSSION**

### **I. STANDARD OF REVIEW**

General demurrers test the legal sufficiency of the factual allegations in a pleading. (Code Civ. Proc., § 430.10, subd. (e); *Restore Hetch Hetchy v. City and County of San Francisco* (2018) 25 Cal.App.5th 865, 871.) When a general demurrer is sustained, appellate courts conduct an independent review of the pleading and decide whether it alleges facts sufficient to state a cause of action under any possible legal

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<sup>3</sup> Allford did not object to, or otherwise oppose, defendants’ request for judicial notice in the trial court. His opposition to the demurrer referred to many of the documents included in the request. We reject Allford’s argument on appeal that the trial court erred in resorting to judicially noticed documents to determine the statute of limitations had elapsed.

theory. (*Restore Hetch Hetchy, supra*, at p. 871.) Reviewing courts treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. (*Id.* at p. 872.) Appellate courts also may consider matters subject to judicial notice and will affirm the judgment if any ground for the demurrer is well taken. (*Ibid.*)

An issue raised in this appeal is how to construe the complaint and materials subject to judicial notice when addressing the elements of equitable tolling. The applicable principles are set forth below in footnote 10.

Also, sometimes the validity of a cause of action depends on how a statute is interpreted. (E.g., *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1242 (*Gutierrez*)). Interpreting statutes presents a question of law subject to independent review on appeal. (*Ibid.*)

During oral argument, counsel for Allford requested leave to amend to allege facts supporting an equitable tolling theory. When, as here, a demurrer is sustained without leave to amend, the appellate court decides “whether there is a reasonable possibility that the defect can be cured by amendment ....” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Ordinarily, the plaintiff must carry the burden of demonstrating a reasonable possibility. (*Ibid.*) If that threshold is satisfied, the judgment of dismissal is reversed and the matter remanded with directions to grant the plaintiff leave to amend. (*Ibid.*)

## II. SECTION 12948

### A. Background

#### 1. *Statutory Text*

Allford’s first cause of action refers to section 12948, Civil Code section 51, subdivision (f), and provisions of the ADA. The current version of section 12948 provides in full:

“It is an unlawful practice under this part for a person to aid, incite, or conspire in the denial of the rights created by Section 51, 51.5, 51.7, 51.9, 54, 54.1, or 54.2 of the Civil Code.”<sup>4</sup>

Section 51 of the Civil Code is known as the Unruh Civil Rights Act. (Civ. Code, § 51, subd. (a).) The fundamental purpose of the Unruh Civil Rights Act is to secure to all persons equal access to public accommodations. (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1145.) To accomplish this purpose, it prohibits “arbitrary discrimination by business establishments,” (*In re Cox* (1970) 3 Cal.3d 205, 216) including discrimination based on disabilities. (Civ. Code, § 51, subd. (b); *Jankey v. Lee* (2012) 55 Cal.4th 1038, 1044.) In 1990, while discussing the origins of the FEHA and its provisions addressing discrimination in employment and housing, the California Supreme Court stated, “the Unruh Civil Rights Act has no application to employment discrimination.” (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 77 (*Rojo*).) In 1992, the Legislature amended the Unruh Civil Rights Act to incorporate by reference the ADA. (*Jankey, supra*, at p. 1044.) The amendment added subdivision (f) to Civil Code section 51, which states:

“A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (Public Law 101–336) shall also constitute a violation of this section.” (Stats. 1992, ch. 913, § 3, No. 6 Deering’s Adv. Legis. Service, p. 3843)

The ADA is much broader than the Unruh Civil Rights Act. Both require equal access to public accommodations. (See 42 U.S.C. §§ 12181–12189.) In addition, the ADA contains provisions addressing disability discrimination by public and private employers (42 U.S.C. §§ 12111–12117) and the access of individuals with disabilities to public services provided by state and local government (42 U.S.C. §§ 12131–12165). A

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<sup>4</sup> Senate Bill No. 224 (2017–2018 Reg. Sess.) (Stats. 2018, ch. 951, § 3, p. 6259, eff. Jan. 1, 2019) amended section 12948 to add Civil Code section 51.9 to the sections listed. The addition is not material to this appeal.

question of statutory interpretation raised in this appeal is whether the addition of subdivision (f) to Civil Code section 51 incorporated the provisions of the ADA addressing employment discrimination into the Unruh Civil Rights Act, a statute that previously had “no application to employment discrimination.” (*Rojo, supra*, 52 Cal.3d at p. 77.)

## 2. *The First Cause of Action*

Allford alleged he filed a discrimination charge with the EEOC stating he had been deprived of the right to confidentiality of information concerning his medical condition. He contends his right to confidentiality was secured by the ADA—specifically, section 12112(d)(4) of title 42 of the United States Code.<sup>5</sup> Allford also alleged defendants retaliated against him for filing the discrimination charge and the retaliation included adverse employment action. He contends the ADA prohibits discrimination (including retaliation) against an individual for filing a charge alleging a violation of rights secured by the ADA. His allegations about violations of the ADA are connected to his claim under section 12948 by paragraph 50 of the FAC, which states:

“In violating the Americans with Disabilities Act as alleged, defendants and each of them denied aided, incited, or conspired in the denial of the rights created by Section 51, subdivision (f) of the Civil Code, in violation of the provisions of Government Code section 12948.”

The trial court concluded the first cause of action was defective because Civil Code section 51 does not apply to employee discrimination cases and, therefore, a section 12948 claim relying on that section did not reach disability discrimination in the employment context. The trial court determined, as a matter of statutory interpretation, that the provisions of the ADA addressing employment discrimination were not incorporated into the Unruh Civil Rights Act by subdivision (f) of Civil Code section 51.

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<sup>5</sup> This provision is contained in the part of the ADA that addresses employment discrimination.

### 3. *Interpreting Subdivision (f) of Civil Code Section 51*

Initially we note the parties have cited, and we have located, no decision by a California appellate court deciding whether subdivision (f) of Civil Code section 51 incorporated the ADA's *employment* discrimination provisions into the Unruh Civil Rights Act. However, this issue of state law has been decided by the Ninth Circuit. (*Bass v. County of Butte* (9th Cir. 2006) 458 F.3d 978, 983 (*Bass*).) Decisions by the lower federal courts "are neither binding nor controlling on matters of state law." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 175.) Nevertheless, such decisions may be persuasive when their analysis is thorough and well-reasoned. (*Ibid.*)

In *Bass*, the Ninth Circuit considered the text and history of the Unruh Civil Rights Act and the ADA, referred to decisions of California courts addressing the scope of the Unruh Civil Rights Act, and methodically applied established principles of statutory construction. The court rejected the interpretation that subdivision (f) of Civil Code section 51 incorporated the ADA's employment discrimination provisions into the Unruh Civil Rights Act. The court concluded such an interpretation would "drastically broaden[ its] reach from public accommodations to employment discrimination." (*Bass, supra*, 458 F.3d at p. 981.) Consequently, the court determined the addition of subdivision (f) to Civil Code section 51 incorporated into the Unruh Civil Rights Act only those provisions of the ADA germane to its original subject matter—that is, discrimination in public accommodations. (*Bass, supra*, 458 F.3d at p. 983.)

In this appeal, Allford's appellate briefs do not mention *Bass* and, as a result, do not challenge any aspect of its reasoning. In light of this approach, we do not discuss *Bass* in detail. We find its analysis persuasive and join in its interpretation of subdivision (f) of Civil Code section 51. We conclude that provision did not drastically expand the Unruh Civil Rights Act by incorporating the provisions of the ADA that address employment discrimination. As a result, our Supreme Court's statement that the

Unruh Civil Rights Act “has no application to employment discrimination” (*Rojo, supra*, 52 Cal.3d at p. 77) remains an accurate description of California law.

4. *Interpreting Section 12948*

Allford contends the trial court sustained defendants’ “demurrer without leave to amend on the first cause of action ... alleging employment discrimination in violation of Government Code section 12948, finding that this section of the FEHA does not apply in the employment context.” Based on this view of the trial court’s rationale, he argues: “Of course the Legislature intended that section 12948 apply Unruh Act protections in employment situations.” Furthermore, he directly challenges defendants’ argument that he “cannot state a claim for violation of Government Code section 12948 without first establishing a violation of the Unruh Act.” To support this argument, Allford contends “section 12948 can be violated by establishing a violation of [Civil] Code section 54, [which prohibits] discrimination on the basis of perceived or actual mental disability.”<sup>6</sup>

First, we recognize that section 12948 is not limited to violations of the Unruh Civil Rights Act. Its text refers to “rights created by Section 51, 51.5, 51.7, 51.9, 54, 54.1, or 54.2 of the Civil Code.” (§ 12948.) Thus, it includes Unruh Civil Rights Act (Civ. Code, § 51), provisions from California’s Disabled Persons Act (Civ. Code, §§ 54, 54.1, 54.2), and other legislation (Civ. Code, §§ 51.5, 51.7, 51.9).

Second, the trial court’s analysis of Allford’s first cause of action was limited to subdivision (f) of Civil Code section 51 because it was the only provision of the Civil Code mentioned in the first cause of action. Consequently, we conclude the trial court did not err when it considered only Civil Code section 51, subdivision (f) as the legal

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<sup>6</sup> Civil Code section 54 is contained in part 2.5 of division 1 of the Civil Code, which “is commonly referred to as the ‘Disabled Persons Act,’ although it has no official title.” (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 674, fn. 8.) Currently, part 2.5 of division 1 of the Civil Code consists of sections 54 through 55.32. Sections 54, 54.1 and 54.2 of the Civil Code are among the sections referred to in section 12948.

basis for treating the alleged violations of the ADA as an unlawful practice under section 12948. Given that the first cause of action explicitly relies on subdivision (f) of Civil Code section 51 and the ADA in alleging defendants aided, incited or conspired in the denial of rights created by Civil Code section 51, we conclude defendants have correctly argued that the viability of Allford's claim of an unlawful practice under section 12948 depended upon first establishing the alleged conduct violated rights created by Civil Code section 51, subdivision (f).

This conclusion brings us back to our earlier statutory interpretation of Civil Code section 51, subdivision (f) and the scope of the rights it created. Applying that interpretation, we conclude the allegations that defendants violated employment discrimination provisions of the ADA fail to state a violation of Civil Code section 51, subdivision (f) and, consequently, fail to state an unlawful practice under section 12948. Therefore, the order sustaining the demurrer to Allford's first cause of action will be upheld.<sup>7</sup>

### III. STATUTE OF LIMITATIONS

#### A. One-Year Statute of Limitations

Generally, employees wishing to pursue an employment discrimination lawsuit for damages under the FEHA must first exhaust their administrative remedies. (*Basurto v. Imperial Irrigation Dist.* (2012) 211 Cal.App.4th 866, 879.) Exhaustion is achieved by filing an administrative complaint with DFEH within one year of the unlawful practice alleged and obtaining a right-to-sue notice. (See §§ 12960, 12965, subd. (b).) After receiving DFEH's right-to-sue notice, an employee usually has one year from the date of the notice to file a lawsuit under FEHA. (§ 12965, subd. (b); *Mitchell v. State Dept. of Public Health* (2016) 1 Cal.App.5th 1000, 1008 (*Mitchell*).)

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<sup>7</sup> We do not reach defendants' arguments relating to collateral estoppel, the other ground given by the trial court for sustaining the demurrer to the first cause of action.

On April 2, 2014, DFEH issued a right-to-sue notice in a matter assigned EEOC No. 480-2014-00847C.<sup>8</sup> On November 23, 2015, Allford filed the present lawsuit in Kern County Superior Court. A comparison of these two dates establishes that the lawsuit was not filed within one year of the DFEH's right-to-sue notice and, therefore, Allford did not comply with the general rule that requires the lawsuit to be filed within one year. (§ 12965, subd. (b).)

B. Statutory Tolling

Next, we consider whether the limitations period was tolled by statute. In this context, “ ‘tolled’ ” means “ ‘suspended’ ” or “ ‘stopped.’ ” (*Mitchell, supra*, 1 Cal.App.5th at p. 1011.) When a limitations period is tolled, that tolled interval is tacked onto the end of the limitations period. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370–371.)

Subdivision (d)(1) of section 12965 tolls FEHA's one-year limitation statute when the following conditions are satisfied: (1) concurrent charges of discrimination or harassment are filed with EEOC and DFEH; (2) DFEH defers investigation of the charges to EEOC; and (3) DFEH issues a right-to-sue notice upon deferral of the charges to the EEOC.

These three conditions were satisfied in the present case. First, the DFEH's April 2, 2014 right-to-sue notice stated Allford's administrative complaint, EEOC No. 480-2014-00847C, was being dual filed with DFEH by EEOC in accordance with section 12960. Second, the notice stated: “EEOC is responsible for processing this

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<sup>8</sup> This notice was obtained before the one-year anniversary of the termination of Allford's employment. Allford's appellate briefs state the charge that resulted in this right-to-sue notice asserted a new claim of discrimination—specifically, defendants terminated Allford's employment on May 7, 2013, in retaliation for the March 2013 filing of his complaint in Kern County Superior Court. If the administrative charge did in fact allege retaliatory termination, then the charge was timely because it was brought within one year of Allford's discharge. We note the record on appeal does not establish the precise nature of the charge.

complaint and the DFEH will not be conducting an investigation into this matter.” Third, the notice stated: “This letter is also your Right to Sue notice.”

The length of the tolling is specified in subdivision (d)(2) of section 12965: “The time for commencing an action for which the statute of limitations is tolled under paragraph (1) expires when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the [DFEH], whichever is later.” Here, the date of the right-to-sue notice from DFEH was April 2, 2014. On December 8, 2014, EEOC issued a “Dismissal and Notice of Rights.” The document stated EEOC was closing its file on the charge because, after factoring the resources considerations, “sufficient information has been received to conclude that this charge should be dismissed.” It also stated:

“This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this notice**; or your right to sue based on this charge will be lost. (The time limit for filing suit on a claim under state law may be different.)”

The 90-day period mentioned in the notice is specified by federal statute. (42 U.S.C. § 2000e-5(f)(1) [a civil action may be brought “within ninety days after the giving of such notice”].) The 90-day period expired on Monday, March 9, 2015. In comparison, the one-year period triggered by the April 2, 2014, DFEH right-to-sue notice expired on April 2, 2015. The statute specifies the limitation period extends to the later of the two dates. (§ 12965, subd. (d)(2).) Consequently, the tolling provision allowed Allford to commence this lawsuit on or before April 2, 2015. Allford filed his state lawsuit on November 23, 2015, well after the period designated in subdivision (d)(2) of section 12965 expired. Consequently, the statutory tolling provisions does not render Allford’s state action timely.

### C. Equitable Tolling

In *Mitchell*, *supra*, 1 Cal.App.5th 1000, once the court determined the plaintiff's complaint was not timely under the statutory tolling provided by subdivision (d)(2) of section 12965, it addressed whether the plaintiff "is eligible for equitable tolling under *Downs* [*v. Department of Water & Power* (1997) 58 Cal.App.4th 1093]." (*Mitchell*, at p. 1009.) We follow the same sequence and next consider Allford's contention that the statute of limitations was equitably tolled while his federal lawsuit was pending.

#### 1. *New Issue on Appeal*

Defendants contend we should not consider equitable tolling because Allford forfeited his right to raise this issue by failing to raise it in his opposition to the demurrer and create a factual record in the trial court. This court has addressed whether a plaintiff is allowed to raise a new legal theory on appeal when challenging an order sustaining a general demurrer. (*Gutierrez*, *supra*, 19 Cal.App.5th at pp. 1243–1244.) We concluded California law permits a plaintiff to raise a new legal theory in that procedural context. (*Id.* at p. 1245; see 4 Cal.Jur.3d (2015) Appellate Review, § 268, p. 375 ["appellant challenging the sustaining of a demurrer without leave to amend may change his or her theory on appeal"]; see also Code Civ. Proc., § 472c, subd. (a).) Based on the reasoning set forth in *Gutierrez*, we reject defendants' argument that Allford forfeited the right to raise the legal theory of equitable tolling in this appeal.<sup>9</sup>

#### 2. *Elements of Equitable Tolling*

Equity will toll the statute of limitation while a plaintiff with multiple legal remedies for the same harm pursues one of those remedies, provided certain elements are present. The elements of "equitable tolling [are] timely notice, and lack of prejudice, to

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<sup>9</sup> We need not decide whether Allford preserved the issue of equitable tolling for appeal by raising it orally at the hearing or by mentioning equitable tolling and *Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093 in his opposition to the demurrer.

the defendant, and reasonable and good faith conduct on the part of the plaintiff.” (*Addison, supra*, 21 Cal.3d at p. 319.) An expanded description of these three elements is: “(1) timely notice to the defendant against whom the doctrine will apply given at or about the time of seeking the first remedy; (2) lack of prejudice to the defendant in gathering evidence and preparing for the second remedy; and (3) good faith and reasonable conduct by the plaintiff. [Fns. omitted.]” (1 Schwing & Carr, Cal. Affirmative Defenses (2018) Statute of Limitations, § 25:70, pp. 1871–1872 (Schwing & Carr).)

A rationale for equitable tolling is efficiency—both for the parties and the judicial system. For instance, the California Supreme Court discerned “no reason of policy which would require plaintiffs to file simultaneously two separate actions based on the same facts in both state and federal courts since ‘duplicative proceedings are surely inefficient, awkward and laborious.’ ” (*Addison, supra*, 21 Cal.3d at p. 319.) “As a general rule, the filing of an action in the wrong court will toll the statute of limitations for ... a subsequent action promptly refiled in the correct court.” (Schwing & Carr, *supra*, § 25:70, p. 1876.) In such a case, prejudice usually is absent because the defendant obtains knowledge of the claim upon service of the first lawsuit and can then take protective steps. (*Ibid.*)

### 3. *Addison*

Allford relies on *Addison* to support his contention that the one-year statute of limitation was equitably tolled while his action was pending in federal court. In *Addison, supra*, 21 Cal.3d 313, the plaintiffs filed timely administrative claims with both the State of California and the County of Santa Clara pursuant to the provisions of the Government Claims Act and, in May 1975, received letters rejecting the claims. Each rejection letter included the warning required by section 913, which stated the plaintiffs had only six months from the date of the notice to file a court action on the claim. (*Addison, supra*, 21 Cal.3d at p. 317.) Three and one-half months later, the plaintiffs filed a complaint in the

federal district court, alleging a federal civil rights violation and, based on the court's pendent jurisdiction, state law causes of action. (*Ibid.*) The defendants filed a motion to dismiss the federal action and, the plaintiffs, anticipating an adverse ruling on the motion, filed a complaint in Santa Clara County Superior Court on February 9, 1976. (*Ibid.*) On February 17, 1976, the federal court granted the motion to dismiss, concluding a federal civil rights action did not lie against public entities. (*Ibid.*) The federal court also decided not to retain the state causes of action. (*Ibid.*)

After the dismissal of the federal action, the defendants filed a demurrer in the Santa Clara County Superior Court, contending the state lawsuit had been filed more than six months after the notices of rejection of the plaintiffs' administrative claims. (*Addison, supra*, 21 Cal.3d at p. 316; see § 945.6 [six-month limitations period].) The superior court sustained the demurrer, concluding the action had been filed late. (*Addison, supra*, at p. 316.) The California Supreme Court disagreed, stating equitable tolling's "elements seemingly are present here." (*Id.* at p. 319.)<sup>10</sup> As a result, the court reversed a judgment of dismissal and remanded to the superior court with directions to overrule the defendants' demurrer. (*Addison, supra*, at pp. 319, 321.)

The California Supreme Court appears to have addressed the element of reasonable, good faith conduct by stating "the federal court, without prejudice, declined to assert jurisdiction over a timely filed state law cause of action and plaintiffs thereafter

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<sup>10</sup> We interpret the phrase "seemingly are present" as a short-handed reference to the well-established principles that govern the construction of a complaint at the pleading stage. (See Code Civ. Proc., § 452 [pleading "must be liberally construed, with a view to substantial justice between the parties"].) Under this rule of construction, reviewing courts draw inferences from the allegations, the exhibits to the pleading, and matters subject to judicial notice that are favorable to the plaintiff, not the defendant, provided those inferences are reasonable. (*Carney v. Simmonds* (1957) 49 Cal.2d 84, 93 (*Carney*) [amended complaint construed in plaintiff's favor; court considered facts "alleged either directly or by inference"]; *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1401–1402 [inferences resulting from liberal construction]; *Advanced Modular Sputtering, Inc. v. Superior Court* (2005) 132 Cal.App.4th 826, 835 [pleadings construed in favor of pleader].)

promptly asserted that cause in the proper state court. Unquestionably, the same set of facts may be the basis for claims under both federal and state law.” (*Addison, supra*, 21 Cal.3d at p. 319.) The court then stated the plaintiffs were not required to file duplicative actions in state and federal courts, thus implying the plaintiffs acted reasonably and in good faith by first pursuing the federal lawsuit. In short, it was reasonable not to file duplicative lawsuits. (*Ibid.*) As to the elements of notice and the lack of prejudice, the court stated:

“[S]ince the federal court action was timely filed, defendants were notified of the action and had the opportunity to begin gathering their evidence and preparing their defense. No prejudice to defendants is shown, for plaintiffs’ state court action was filed within one week of the dismissal of the federal suit. To apply the doctrine of equitable tolling in this case, in our view, satisfies the policy underlying the statute of limitations without ignoring the competing policy of avoiding technical and unjust forfeitures.” (*Addison, supra*, 21 Cal.3d at p. 319.)

In *Addison*, the California Supreme Court determined the existing allegations adequately supported the equitable tolling theory. As a result, the court directed the trial court to overrule the demurrer, rather than directing plaintiffs be granted leave to amend to plead additional facts. (*Addison, supra*, 21 Cal.3d at p. 321.)

#### 4. *Pleading Equitable Tolling*

Generally, when a complaint shows on its face that the cause of action is apparently barred by the statute of limitation, but the plaintiff relies on some ground suspending the running of the statute, the plaintiff must plead facts supporting that ground or a demurrer will lie. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 931, p. 346.) In accordance with this general rule, this court recognized that when a plaintiff relies on equitable tolling “to save a cause of action that otherwise appears on its face to be time-barred, he or she must specifically plead facts which, if proved, would support the theory.” (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 641.) In accordance with the general principles governing the construction of pleadings, we conclude this

principle applies to situations where judicially noticed documents provide some or all of the information used to conclude the lawsuit was filed outside the applicable statute of limitations and also provide facts and support inferences relevant to the elements of equitable tolling.

5. *Notice and Lack of Prejudice*

Defendants contend Allford's FAC did not allege facts that would satisfy the elements of equitable tolling. Defendants' arguments focus on the elements of prejudice to them and Allford's lack of good faith.

We briefly address the element of notice to defendants. Allford's original complaint in the federal action included allegations of retaliatory termination. As that original complaint appears to have been filed before Allford obtained any right-to-sue letters relating to his termination, we note the first and second amended complaints in the federal action (filed September 2014 and June 2015, respectively) also alleged retaliatory termination and included a general allegation that Allford had obtained the requisite right-to-sue letters. This general allegation about the right-to-sue letters is supported by the trial court's taking judicial notice of DFEH's April 2, 2014 right-to-sue notice. Therefore, at a minimum, defendants were notified by the filing of the first amended complaint in September 2014, that Allford had the right to pursue a retaliatory termination claim in court and was, in fact, doing so. Consequently, the element of equitable tolling addressing notice to defendants is adequately supported by the documents subject to judicial notice.

Defendants contend equitable tolling does not apply because they suffered prejudice from Allford's lack of diligence in litigating his claims. Defendants' argument about the existence of prejudice is not specific but relies on the general statement that equitable tolling would force them "to again defend against stale claims with evidence based on faded memories and less-effective witnesses." This argument is not based on

direct evidence of prejudice. Instead, defendants appear to be drawing inferences that are favorable to them, not the pleader, which is contrary to the general principles governing the construction of a pleading. (See *ante*, fn. 10.)

The prejudice element of equitable tolling relates to the “lack of prejudice to the defendant in gathering evidence and preparing for the second remedy.” (Schwing & Carr, *supra*, § 25:70, pp. 1871–1872.) When an action filed in federal court is dismissed and the state law claims are promptly refiled in state court, prejudice usually is absent because the defendant obtains knowledge of the claim upon service of the first lawsuit and can then take protective steps. (See *id.*, at p. 1876; *Addison, supra*, 21 Cal.3d at p. 319 [no prejudice to defendants was shown, as defendants were notified by timely federal action and had the opportunity to begin gathering their evidence and preparing their defense].) Inferring the absence of prejudice is appropriate at the pleading stage of this case. We have located nothing in the record showing (1) defendants were not able to gather evidence and prepare their defense during the period that Allford’s state law claims were part of the federal action, or (2) defendants experienced harm during the 31 days between the dismissal of the federal action and the filing of the present action.

Instead, when the allegations in the complaint and the documents subject to judicial notice are construed in Allford’s favor, as is appropriate when challenges to a cause of action are raised at the pleading stage, it is reasonable to infer defendants did not suffer prejudice in gathering their evidence and preparing their defense as a result of Allford first pursuing the claims in federal court. (See *Carney, supra*, 49 Cal.2d at p. 93.) This is the same inference the Supreme Court drew from the record presented in *Addison, supra*, 21 Cal.3d at p. 319.

#### 6. *Reasonableness and Good Faith*

Defendants also contend Allford cannot rely on equitable tolling because he acted in bad faith and did not pursue his claim diligently. Specifically, they assert: “His

litigation conduct shows that he has engaged in repeated forum shopping and has improperly attempted to extend the time to bring stale claims against [defendants] since March 2013. In particular, equitable tolling is inapplicable because of [Allford's] voluntary dismissal of his original state court action in August 2013.”

Initially, we address defendants’ contention that Allford’s voluntary dismissal of his first state court action in August 2013 forever relinquished his right to sue them for FEHA violations. Defendants cite *Thomas v. Gilliland* (2002) 95 Cal.App.4th 427 for the proposition that equitable tolling is inapplicable where the plaintiff dismissed his original action. Their argument overlooks *Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, where the court reviewed various cases cited by the respondents and concluded those cases did not “establish a general rule that voluntary dismissal precludes application of the equitable tolling doctrine.” (*Id.* at p. 40.) Instead, the court concluded those cases turned on the failure to establish all three of the elements of equitable tolling based on the facts presented. (*Id.* at pp. 40–41.) Accordingly, we decline to adopt a categorical rule of law stating that a plaintiff who voluntarily dismissed a prior action can never assert equitable tolling in a subsequent action—particularly when, as here, the equitable tolling is not based on a voluntarily dismissed lawsuit. Instead, we conclude that whether the three elements of equitable tolling are satisfied must be decided based on the facts and circumstances of each case and, at the pleading stage, the existence of those facts is determined by the principles governing the construction of pleadings and documents subject to judicial notice. (See *ante*, fn. 10.)

Defendants contend there were several aspects of Allford’s decisionmaking that were not explained *in the trial court proceedings*. Defendants do not argue Allford is unable to allege facts showing he acted in good faith. (See *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746 [“issue of leave to amend is always open on appeal, even if not raised by the plaintiff”]; see also Code Civ. Proc., § 472c.) In contrast, Allford’s appellate briefs offer an explanation of his decision to dismiss his first state

court action. Allford states he realized “among other things, that he had not yet received a ‘right to sue’ letter regarding the retaliatory termination” and dismissed the suit without prejudice to obtain such a letter. This explanation appears reasonable and we conclude there is a reasonable probability that Allford can amend his pleading to allege facts that adequately address the equitable tolling element of reasonable, good faith conduct on his part. (See *Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318 [leave to amend appropriate when plaintiff shows a reasonable possibility that the defect in the pleading can be cured by amendment].)

Furthermore, we conclude allowing plaintiff to directly address equitable tolling by amending his pleading is consistent with *Mojica v. 4311 Wilshire, LLC* (2005) 131 Cal.App.4th 1069, where the trial court sustained a demurrer based on untimeliness under the statute of limitations and granted leave to amend. (*Id.* at p. 1072.) The trial court’s order allowed the appellant to file “a first amended complaint adding allegations that her federal lawsuits had equitably tolled the statute of limitations, making her state court complaint timely.” (*Ibid.*) After the amendment was filed, the trial court sustained a demurrer without leave to amend on the ground the complaint was untimely. (*Ibid.*) On appeal, the Second Appellate District concluded the appellant’s reasonableness was a disputed fact and “nothing on the complaint’s face demonstrates bad faith.” (*Id.* at p. 1074.) The Second Appellate District concluded the complaint and facts subject to judicial notice provided a sufficient basis for appellant’s equitable tolling theory and directed the trial court to overrule the demurrer to the first amended complaint. (*Id.* at p. 1075.) Unlike the appellant in *Mojica*, Allford has not had the opportunity to address equitable tolling in his pleading.

Accordingly, we conclude Allford should be granted leave to amend his pleading to expressly include equitable tolling as a justification for failing to file his state court action within the one-year statute of limitations. (See *Ard v. County of Contra Costa*

(2001) 93 Cal.App.4th 339, 348 [judgment of dismissal reversed, plaintiff granted leave to amend to allege equitable estoppel prevented the claim from being time barred].)

#### IV. RES JUDICATA

Defendants contend Allford's entire lawsuit is barred by res judicata because Allford litigated his primary right to continued employment in federal court to a final judgment. This argument was not presented by defendants to the trial court, but defendants contend they may raise it for the first time on appeal because (1) it presents a purely legal question based on undisputed evidence, and (2) it raises a defect in Allford's case that cannot be cured.

The doctrine of res judicata gives conclusive effect to a former judgment when subsequent litigation involves the same controversy. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.) The claim preclusion aspect of res judicata operates to bar the maintenance of a second suit between the same parties on the same cause of action. (*Ibid.*) The application of the doctrine to an entire cause of action requires: (1) the claim raised in the present action be identical to the claim litigated in a prior proceeding; (2) a final judgment on the merits in the prior proceeding; and (3) the party against whom the doctrine is being asserted was a party, or in privity with a party, to the prior proceeding. (*Ibid.*)

Defendants' res judicata argument is based on the federal court's dismissal order of October 23, 2015, which stated the first cause of action failed to "state a claim upon which relief can be granted pursuant to 42 U.S.C. § 1983" and dismissed the second through fourth causes of action for lack of subject matter jurisdiction. In addition, the order stated:

"3. As all federal claims have been dismissed, the Court declines to exercise pendent jurisdiction over the remaining state law claims and thus dismisses without leave to amend the third and fourth causes of action against the individual Defendants; and

“4. Individual Defendant’s motions to dismiss the third cause of action (Doc. 37) and the fourth cause of action (Docs. 39-42) are denied as moot.”

These paragraphs readily demonstrate that the federal order did not result in a final judgment on the merits of the state law claims. Instead, the federal court expressly declined to (1) exercise jurisdiction over those claims, and (2) decide the motions to dismiss directed at the state law claims. Accordingly, we conclude the doctrine of res judicata does not apply to preclude Allford from pursuing the state law claims alleged in his second through fifth causes of action.

### **DISPOSITION**

The judgment is reversed. The trial court is directed to vacate the part of its order sustaining the demurrer without leave to amend as to the second through fifth causes of action and to enter a new order sustaining the demurrer as to the second through fifth causes of action with leave to amend to allege facts relating to equitable tolling. The part of the trial court’s order sustaining the demurrer without leave to amend as to the first cause of action is affirmed. Michael G. Allford shall recover his costs on appeal.

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HILL, P.J.

WE CONCUR:

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FRANSON, J.

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SNAUFFER, J.